Supreme Court, U. S.
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No. 77-723

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONN E. CASSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court of appeals erred in remanding the case to permit the district court to vacate the dismissal of the indictments against petitioner and to reinstate his case for trial.

In December 1976 and February 1977, petitioner was charged in four separate indictments with defrauding an agency of the United States, in violation of 18 U.S.C. 2 and 1006, and with conspiring to commit that offense, in violation of 18 U.S.C. 371 (Pet. 2-3). Petitioner's motion for dismissal of these indictments on the ground of multiplicity was granted on June 3, 1977 (see Pet. App. B), and on June 30, 1977, the government filed a notice of appeal from these orders (Pet. 3).

Petitioner's co-defendants then filed similar motions for dismissal of their indictments. During the course of the hearing on the co-defendants' motions, the district judge indicated his belief that he had erred in granting petitioner's motion to dismiss. Accordingly, the government filed a motion in the court of appeals requesting that the case be remanded to permit the district court to vacate the orders of dismissal and to reinstate the case for trial. The court of appeals granted the government's motion (Pet. App. A).

Petitioner contends (Pet. 5-11) that the court of appeals' procedure in remanding the case to the district court to permit reinstatement of the indictments (which he challenged in the district court as multiplicitous) is unprecedented and denied him due process of law. We believe that this contention is without merit, and that the case presents no issue warranting review in this Court.

The government's motion for remand apprised the court of appeals and petitioner that it was based upon the district court's determination that it had erred in dismissing the indictments against petitioner. After petitioner filed a response opposing the motion, the government filed an affidavit and brief in reply that elaborated upon the circumstances leading to the district court's determination that the dismissals had been erroneous and discussed the reasons a remand would be appropriate.[1] Despite petitioner's arguments that the procedure followed here was improper, we find nothing in Fed. R. App. P. 27 prohibiting the filing of such a reply.[2]

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[1]Copies of the government's motion, affidavit, and brief are being lodged with the Clerk of this Court.

[2]*Roemer* v. *Simon*, 91 U.S. 149, upon which petitioner relies (Pet. 6-7), is inapposite, since the portion of the quotation petitioner omitted expressly grounds the opinion on the special procedures and

And although the government's brief did not repeat all of the arguments that had been presented to the district court on the multiplicity question, it did focus on the fact that the dismissal of *all* the charges pending against petitioner on the ground of multiplicity was patently improper, since the maximum remedy for multiplicitous charges would be a forced election of counts or a dismissal of the counts that improperly multiplied the offenses charged. See 8 Moore's *Federal Practice* § 8.07[1] (2d ed., 1977); cf. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225.

On these facts, the court of appeals' decision to remand the case was a proper exercise of the power conferred upon it by 28 U.S.C. 2106 to "vacate, set aside or reverse any judgment * * * lawfully brought before it for review, and remand the cause * * * or require such further proceedings to be had as may be just under the circumstances." Permitting such reconsideration by the district court is consistent with this Court's practice of remanding decisions to the lower courts for reconsideration in connection with new rulings by this Court, changes in the applicable statutes, confessions of error and the like.[3]

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requirements of the Equity Rules, which are, of course, no longer in force. For example, Equity Rule 88 terminated the jurisdiction of the court below at the end of its term, a provision relevant to the possibility for a remand to that court.

[3]The court of appeals' ruling will not, of course, prevent eventual appellate review of petitioner's claim of multiplicity; it merely puts him in the same position as he would have been had the district court ruled against him in the first instance. Such a ruling would not have been subject to an interlocutory appeal. See *Abney* v. *United States*, 431 U.S. 651, 663; *Cobbledick* v. *United States*, 309 U.S. 323. If petitioner is convicted, he can appeal, and his claims will be considered on the merits by the court of appeals at that time. If his

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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conviction is affirmed by the court of appeals, he will then be able to present his multiplicity contention to this Court by way of a petition for a writ of certiorari seeking review of the final judgment.